In the

Supreme Court of the United States

October Term, 1946

No. 497

149 Madison Avenue Corp. and Williams & Co., Inc.,

Petitioners.

against

Frank Asselta, Camilo Del Rio, Joseph McArdle, Samuel Manne, Cornelius McCole, Burton Peterson, Frank Rodriguez, James Torra, John H. Berger and George Berger,

Respondents.

MOTION BY PETITIONERS TO MODIFY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF

Walter Gordon Merritt,
Robert R. Bruce,
Counsel for Petitioners.

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FRANK ASSELTA, CAMILO DEL RIO, JOSEPH MCARDLE, SAMUEL MANNE, CORNELIUS MCCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,

Respondents.

MOTION BY PETITIONERS TO MODIFY JUDGMENT

Petitioners, 149 MADISON AVENUE CORP. and WILLIAMS & CO., INC., respectfully move this Court to modify its judgment herein by remanding this case to the District Court for the Southern District of New York with directions to that Court to permit petitioners to plead and prove under Sections 9 and 11 of the Portal-to-Portal Act of 1947 and to withhold the entry of final judgment on the mandate of this Court pending and subject to the trial of any issues raised under said sections; or, in the alternative, that this Court, if so advised, rehear the case in the light of the defenses now afforded by said Sections 9 and 11.

It is also respectfully moved that this Court stay issuance of its mandate pending disposition of this motion.

Dated: May 28, 1947.

WALTER GORDON MERRITT,
ROBERT R. BRUCE,
Counsel for Petitioners.

Memorandum in Support of Motion

In its opinion filed May 5, 1947 this Court held that the District Court and the Circuit Court of Appeals properly determined that the wage agreement in question, known as the National War Labor Board Agreement, failed to satisfy the requirements of Section 7(a) of the Fair Labor Standards Act of 1938.

On May 14, 1947 there was enacted the Portal-to-Portal Act of 1947. Sections 9 and 11 of that Act, set forth in the Appendix together with Section 1 containing the Congressional "Findings and Policy", substantially changed the law governing liability and the amount of recovery in pending actions under the Fair Labor Standards Act of 1938.

In substance Section 9 provides that no employer shall be liable on account of his failure to pay wages in accordance with the Fair Labor Standards Act "if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged." Section 11 provides that if the employer "shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16(b) of such Act."

This action was "commenced prior to" the Portal-to-Portal Act and is still within the jurisdiction of this Court.

Sections 9 and 11 of the Portal-to-Portal Act are remedial and apply to pending actions. Petitioners are entitled to the benefit of the changed law. *Carpenter* v. *Wabash Ry. Co.*, 309 U. S. 23, 27; *American Foundries* v. *Tri-City Council*, 257 U. S. 184, 201; *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115; *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U. S. 9, 21.

Petitioners merely seek an opportunity to present their defenses under Sections 9 and 11. While evidence exists in the present case to support said defenses, there is additional evidence available for presentation to the District Court relating thereto. Petitioners believe the fullest opportunity for such defenses and the most appropriate method of carrying out the Congressional mandate, lies in the remand of this case to the District Court with appropriate instructions.

Reflecting the merits of petitioners' motion, petitioners acted in accordance with the wage agreement whose terms were recommended by Directive Order of the National War Labor Board, as acknowledged by this Court in its opinion (R. p. 40, Pl. Ex. 4). Moreover, in the lower court near the close of the case, the trial judge said:

> "I got the impression at the trial from Mr. Hauer that the employers mean to do what is right by their employees (S. M. 488).
>
> • • • • •
>
> "There is no evidence by the way in which they got the result they meant to circumvent the law. I mean, it is quite the contrary, because they got the contract through the War Labor Board (S. M. 489).
>
> • • • • •
>
> "My impression, so far as I have gotten it, was that these people and the War Labor Board and the Real Estate Board and all, each according to its

lights and the state of the law at the time, did something which they thought they had a right to do and therefore you can't say they were deliberate cheaters of labor" (S. M. 494).

These references from the trial minutes were not included in the transcript of record in the Circuit Court or in this Court because under the then existing law petitioners' good faith was wholly immaterial. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572; *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697.

Modification of the judgment of this Court, as suggested in this motion, is necessary to effectuate the will of Congress and in the interest of substantial justice.

Respectfully submitted,

WALTER GORDON MERRITT,
ROBERT R. BRUCE,
Counsel for Petitioners.

Counsel's Certificate

We hereby certify that the foregoing motion to modify the judgment is presented in good faith and not for delay.

WALTER GORDON MERRITT,
ROBERT R. BRUCE,
Counsel for Petitioners.

Appendix

Part I

Findings and Policy

Section 1. (a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would

be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound, and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that

this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

(b) It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

* * * *

SEC. 9. RELIANCE ON PAST ADMINISTRATIVE RULINGS, ETC. —In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

* * * *

Sec. 11. LIQUIDATED DAMAGES.—In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court m , in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 (b) of such Act.

SUPREME COURT OF THE UNITED STATES

No. 497.—October Term, 1946.

149 Madison Avenue Corporation, and Williams & Co., Incorporated, Petitioners, *v.* Frank Asselta, Camilo Del Rio, Joseph McArdle, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 5, 1947.]

Mr. Chief Justice Vinson delivered the opinion of the Court.

This employee suit was brought in the District Court to recover overtime compensation, liquidated damages, and a reasonable attorney's fee pursuant to §§ 7 (a) and 16 (b) of the Fair Labor Standards Act of 1938.[1] Recovery was allowed in the District Court, and that judgment was affirmed in the Circuit Court of Appeals. We granted certiorari to consider the important questions presented

[1] 52 Stat. 1060, 29 U. S. C. § 201 *et seq.* Insofar as pertinent, § 7 (a) provides:

"No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

. . . .

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 16 (b) provides in part:

"Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . ."

relating to the application of the overtime provisions of the above-mentioned statute.

Respondents are service and maintenance employees who, during the period in question, worked in a loft building owned by petitioner 149 Madison Avenue Corporation and managed by petitioner Williams & Co. It has been stipulated that respondents were engaged in the production of goods for commerce.[2] We are here concerned with the period of employment extending from April 21, 1942, to December 10, 1943.

Prior to April 21, 1942, employment relations between the petitioners and respondents were governed by a collective wage agreement, known as the Sloan Agreement.[3] According to its terms, employees were paid flat weekly wages for workweeks of specified length which, in the case of most of the respondents, amounted to $25 for 47 hours of weekly employment. No hourly rates were specified, nor was any attempt made to compensate employees at the rate of time and one-half for hours worked in excess of 40 in any week.

As the expiration date of the Sloan Agreement drew near, negotiations between the interested parties were initiated for the purpose of reaching agreement on a new contract. After preliminary conferences proved fruitless, the case was certified to the War Labor Board. That agency stated its recommendations in a directive order

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[2] Petitioners have raised no objection as to the amount of the recovery allowed the respondents by the District Court if it be assumed that the lower courts otherwise correctly determined their liability.

[3] The Sloan Agreement was negotiated between the Realty Advisory Board on Labor Relations, Incorporated, as agent for various owners of loft, office and apartment buildings located in the Borough of Manhattan in the City of New York, and Local 32-B of the Building Service Employees International Union on behalf of its members. The same parties negotiated the agreement in question.

issued July 29, 1942; and on September 1, 1942, the parties entered into the agreement in question, known as the National War Labor Board Agreement. It had been agreed that the terms of the new contract were to be made retroactive to April 20, 1942, the expiration date of the Sloan agreement.

The new contract provided for a workweek of 54 hours applicable to watchmen and a workweek of 46 hours for other regular employees. Weekly wages were established to compensate the 54 or 46 hours of labor which sums were stated to include both payments for the regular hours of employment and time and one-half for the hours in excess of 40. To derive the hourly rate from the weekly wage, the following formula was included:

"The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours."

Although a literal reading of the above language might seem to indicate the establishment of a variable hourly rate dependent upon the number of hours actually worked in any given week, such was not the practical construction of the parties. Instead of making use of the number of hours actually worked, only the hours the employee was scheduled to work and the weekly wage for such scheduled workweek entered into the calculation of the non-overtime hourly rate.[4] The hourly rate as derived from the formula remained constant, therefore, regardless of whether the

[4] In case of an employee hired for a regular 46 hour week at a weekly wage of $27.50, the "hourly rate" was derived from the formula by means of the following calculation: $27.50 ÷ [46 + ½(46 − 40)] = $.561 per hour. In effect, the formula rate is obtained, not by dividing the weekly wage by 46, the number of hours scheduled to be worked, but by dividing that sum by 49, a divisor determined by the formula. In the case of a watchman hired for a 54 hour week at the same weekly wage, the formula rate was determined by this calculation: $27.50 ÷ [54 + ½(54 − 40)] = $.4508 per hour.

employee worked the scheduled number of hours during the week or a greater or lesser number. In effect, the agreement instead of directly stating a fixed hourly rate in terms of a stipulated amount per hour provided a formula whereby such a fixed hourly rate could be calculated.

Under the agreement, weekly compensation varied according to the number of hours worked in that week. Thus, in case an employee was unable to work all his scheduled hours due to an "excusable cause," he was paid at the formula rate with the provision, however, that six of the hours worked should be compensated as overtime regardless of whether the total of hours actually worked was greater or less than 40 in that week. If the employee's absence was not excusable, he was apparently paid a sum for the week obtained by multiplying the number of hours actually worked times the formula rate, being given credit for overtime only in case the number of hours worked exceeded 40.[5] The agreement provided that all regular employees except watchmen should be compensated at a rate one and three-quarters times the hourly rate derived from the formula for hours worked in excess of 46. Watchmen were to be paid twice the formula rate for hours worked in excess of 54. Part-time workers employed for less than the scheduled workweek were hired at a specified schedule of hourly rates obtained by dividing the weekly wage paid the regular employees by the number of hours in the regular workweek.

It was not the purpose of Congress in enacting the Fair Labor Standards Act to impose upon the almost infinite variety of employment situations a single, rigid form of wage agreement. *Walling* v. *Belo Corp.*, 316 U. S. 624 (1942). Section 7 (a) of the Act requires, however, that any wage agreement falling within its purview must es-

[5] The agreement made no specific provision for situations involving unexcused absences. The above-described procedure seems to have been applied in practice, however.

tablish an hourly "regular rate" not less than the statutory minimum and provide for overtime payments of at least one and one-half times the "regular rate." A wage plan is not rendered invalid simply because instead of stating directly an hourly rate of pay in an amount consistent with the statutory requirements, the parties have seen fit to stipulate a weekly wage inclusive of regular and overtime compensation for a workweek in excess of 40 hours and have provided a formula whereby the appropriate hourly rate may be derived therefrom. The crucial questions in this case, however, are whether the hourly rate derived from the formula here presented was, in fact, the "regular rate" of pay within the statutory meaning and whether the wage agreement under consideration, in fact, made adequate provision for overtime compensation.

We have held that the words "regular rate," while not expressly defined in the statute, ". . . mean the hourly rate actually paid for the normal, non-overtime workweek." *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, 40 (1944). The regular rate is thus an "actual fact," and in testing the validity of a wage agreement under the Act the courts are required to look beyond that which the parties have purported to do. *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 424 (1945). It is the contention of the respondents that the rate derived by the use of the contract formula was not the regular rate of pay; that the regular rate actually paid was substantially that obtained by dividing the weekly wage payable for the working of the scheduled workweek by the number of hours in such scheduled workweek; and that consequently, the plan made no adequate provision for overtime compensation until employees regularly hired as watchmen had worked a total of 54 hours in one week and until other regular employees had worked a total of 46 hours. We believe that the record provides ample support for that view.

Thus, in determining a schedule of hourly rates payable to part-time workers employed less than 40 hours a week, no use whatsoever was made of the hourly rate derived from the formula. Part-time workers were paid a rate determined by dividing the weekly wage paid to the regular employees by the number of hours in the regular workweek despite the fact that, according to the terms of the formula, the weekly wage included both regular and overtime pay. Insofar as part-time workers were concerned, the agreement clearly indicated an intention to compensate an hour's labor by payment of a pro-rata share of the weekly wage.

Nor was there consistent application of the hourly rate as determined by the formula to the work of regular employees hired for a full 46 hour week. Where such an employee was absent for an "excusable cause," his weekly compensation was not determined by multiplying the formula rate by the hours worked. Rather, six of the hours the employee worked were always treated as overtime and compensated at the rate of one and one-half times the formula rate regardless of the total hours actually worked, thus resulting in average hourly compensation considerably in excess of the formula rate. The payment of "overtime" compensation for non-overtime work raises strong doubt as to the integrity of the hourly rate upon the basis of which the "overtime" compensation is calculated. Cf. *Walling* v. *Helmerich & Payne, Inc., supra.* While the average hourly rate actually received by the employee in this situation was not precisely that which would have resulted from dividing the weekly wage by 46, it ordinarily approached that figure much more closely than it did the so-called hourly rate established by the formula.[6] This method of payment reveals further evi-

[6] Thus the employee Anderson worked only 39 hours in the week of Feb. 14, 1943, the 7 hours of absence apparently being due to an "excusable cause." Under the agreement, which would entitle him to six hours of "overtime" pay, he should have received weekly compensation in the amount of $23.56. The actual average hourly rate

dence of an attempt to pay a pro-rata share of the weekly wage for an hour's labor regardless of the number of hours worked up to 46.

The agreement provided that hours worked in excess of the scheduled 46 hour week should be compensated at the rate of one and three-quarters of the formula rate.[7] While the formula rate seems to have been consistently applied in such situations, it is significant to observe that the amount received by the worker under these circumstances approximates very closely that which he would have received had he been paid an hourly rate determined by dividing the weekly wage payable for the scheduled workweek by 46 with payment of time and one-half for hours worked in excess of 46.[8] This approximation was not fortuitous. In the directive order of the National War Labor Board the origin and purpose of these provi-

during that week accordingly would be $.604. If Anderson had been paid on an hourly basis determined by dividing the weekly wage paid for a scheduled workweek by the number of hours in such workweek, he would have received $.598, whereas, had he been paid the straight formula rate he would have received $.561 per hour. So also, the petitioner Peterson in the week of Dec. 13, 1942, was absent 16 hours for excusable causes. The payroll records reveal he earned $18.50 or an actual average hourly rate of $.617 as compared to $.598, the average rate for a scheduled workweek, and to $.561, the formula rate.

[7] In the case of watchmen, who were assigned a scheduled week of 54 hours, twice the formula rate was paid for hours worked in excess of 54.

[8] Thus if an employee hired for a regular workweek of 46 hours at $27.50 worked 50 hours in one week, his total weekly compensation would amount to $31.43 if compensated in accordance with the terms of the agreement. If, instead, the employee were hired on a straight weekly basis at the same weekly wage with provision for time and one-half the average hourly rate, for hours worked in excess of 46, he would receive $31.09 as total weekly compensation for 50 hours of work. If a watchman, scheduled to work a 54 hour week at $27.50 actually worked 58 hours he would receive $31.11 weekly compensation if calculated according to the agreement, or $30.55 if calculated on a straight weekly basis with time and one-half for hours worked in excess of 54.

sions are discussed, and the following statement is made: "Overtime over forty-six (46) hours is paid at a rate of time and three-quarters in an effort approximately to equal *the overtime to which an employee would ordinarily be entitled, if it were computed on the basis of time and a half over a forty-six (46) hour week.*" [9]

Petitioners have argued that none of these provisions provides a conclusive demonstration that the formula rate was not the actual regular rate of pay. It is said that part-time employees were paid a pro-rata hourly rate since they had no opportunity to earn overtime compensation; that the method of paying regular employees in case of excusable absences was merely a laudable effort on the part of the employer to compensate more fully than the Act requires when an employee failed to work his scheduled week because of illness or like causes; and that the time and three-quarters provision represented an additional premium for employees called upon to work hours substantially in excess of the non-overtime week. We cannot ignore the fact, however, that the agreement on its face fails to provide for the consistent application of the formula rates in those situations where such rates should be expected to control. These deviations take on additional significance when it is observed that in every situation, with the relatively unimportant exception of that involving unexcused absences,[10] the amount paid was either precisely or substantially that which employees

[9] (Emphasis supplied.) The agreement in question also contained the following provision: "Per diem rates of pay of any employee shall be arrived at by dividing the applicable weekly wage by the normal number of days per week worked by that employee in the building in question." This provision is obviously at odds with the statement in the agreement that the weekly wage stipulated for a scheduled workweek included both regular pay and overtime for hours worked over 40. There is nothing in the record, however, to indicate that the per diem provisions were actually applied. Petitioner explains its presence in the agreement as an inadvertent hold-over from the earlier Sloan Agreement.

[10] See note 5 *supra*.

would have been paid had the contract called for employment on a straight 46 hour week with payment of time and one-half only for hours worked in excess of 46.

Further light is thrown upon the nature of the wage agreement by a consideration of the plan in actual operation. During the period between April 21 and September 1, 1942, when the contract in question was the subject of negotiation, it was understood that the old Sloan Agreement should remain in effect but that the terms of the new contract should be given retroactive application to April 20. The Sloan Agreement provided for a minimum wage of $25 for a workweek of 47 hours with no provision for overtime for hours worked in excess of 40. It is obvious, therefore, that between the above-mentioned dates the employees were paid on a basis clearly repugnant to the requirements of § 7 (a) of the Fair Labor Standards Act. Petitioners urge, however, that by making the retroactive payments as required by the agreement, any illegality in the method of payment during the period of negotiations was eliminated. But in attempting to satisfy the retroactive liability, petitioners completely ignored the formula rates and paid each of the respondents $2.50 for each week worked during the period, representing the increase in the minimum weekly wage for the scheduled workweek established by the new agreement, without attempting further adjustment. Petitioners admit that "Undoubtedly some employees who worked no overtime in certain weeks were overpaid; other who worked beyond the scheduled workweek of 47 hours then prevailing may not have been paid enough." It is apparent that the amount of wages paid the respondents for work performed during the period of negotiations was in no sense determined by application of hourly rates derived from the formula.[11]

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[11] A somewhat similar situation prevailed with respect to an increase of $1.40 in the weekly wage granted on October 10, 1943, and made retroactive to April 21, 1943. It appears that petitioners

The parties have called our attention to much other evidence which, it is asserted, reveals the practical construction given to the terms of the agreement in question. We do not feel that it is necessary to review these matters at length. It is sufficient to state that, after considering the terms of the agreement and the operation of the plan in actual practice, we have come to the conclusion that the agreement in this case was one calling for a workweek in excess of 40 hours without effective provision for overtime pay until the employees had completed the scheduled workweek and that the "hourly rate" derived from the use of the contract formula was not the "regular rate" of pay within the meaning of the Fair Labor Standards Act. This is not a case like *Walling* v. *Belo Corp., supra,* or *Walling* v. *Halliburton Oil Well Cementing Co.,* — U. S. — (1947). Unlike those cases there was here no provision for a guaranteed weekly wage with a stipulation of an hourly rate which under the circumstances presented could properly be regarded as the actual regular rate of pay.

We hold for the reasons stated above that the District Court and the Circuit Court of Appeals properly determined that the wage agreement in question failed to satisfy the statutory requirements. *Walling* v. *Helmerich & Payne, Inc., supra; Walling* v. *Youngerman-Reynolds Hardwood Co., supra; Walling* v. *Harnischfeger Corp.,* 325 U. S. 427 (1945).

Affirmed.

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made some effort to make adjustments consistent with the formula in payment to employees who had worked hours in excess of the scheduled workweek. It is conceded, however, that no such adjustments were made with respect to those who worked less than their scheduled hours in weeks during the retroactive period, such employees being paid the full weekly increase for each week employed regardless of hours actually worked.